



The Commonwealth of Massachusetts

Committee for Public Counsel Services

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**REPORT OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES REGARDING
THE IMPLEMENTATION OF THE DIRECTIVE TO DEVELOP A SYSTEM OF
APPOINTMENT OF COUNSEL IN WHICH NO LESS THAN 25 PER CENT OF
INDIGENT DEFENDANTS BE REPRESENTED BY PUBLIC DEFENDER STAFF BY
THE END OF FISCAL YEAR 2012**

The Committee for Public Counsel Services (CPCS) submits this report in compliance with the directive of the Legislature set forth in line item 0321-1500 of the FY2012 General Appropriations Act, Chapter 68 of the Acts of 2011, that CPCS develop a system of appointment of counsel in which no less than 25 per cent of indigent defendants be represented by public defender staff by the end of fiscal year 2012.

1. Introduction

The FY 2012 General Appropriation Act, Chapter 68 of the Acts of 2011, signed into law on July 11, 2011, required that the Committee for Public Counsel Services (CPCS) provide a report to the Legislature, no later than September 1, 2011, detailing an implementation plan for meeting the newly created mandate that 25 percent of indigent defendants be represented by public defender staff by the end of fiscal year 2012. CPCS is a statewide organization which currently employs 252 staff attorneys and contracts with approximately 3,000 private attorneys in various practice areas to fulfill the Commonwealth's obligation to provide counsel to the indigent; a fundamental constitutional and statutory right most notably established in the landmark case, *Gideon v. Wainwright*, 372 U.S.335 (1963), and reaffirmed unanimously by the Supreme Judicial Court in *Lavalee v. Justices in the Hampden Superior Court*, 442 Mass 228 (2004). Our projected caseload for FY 2011 was approximately 260,000 cases.

Historically, since the enactment of MGL Chapter 211D in 1984, which created the present delivery system, bringing all representation of those entitled to counsel under one supervisory oversight agency, the full time staff has represented approximately 10 percent of all cases. Private bar practitioners organized into county based bar advocate criminal law panels or certified panels taking non-criminal entitlement cases represented the 90 percent balance. It is also important to note that in a large percentage of the cases in which CPCS provides counsel the client is not a "defendant," but rather a person involved in a non-criminal proceeding. CPCS's scope of service is very broad including care and protection "family law" cases, juvenile delinquency cases, mental health commitment cases, guardianship cases, probate proceeding cases, and housing court cases in addition to our criminal case

responsibilities. Although the language of Chapter 68 of the Acts of 2011 may be interpreted to mean merely our criminal law responsibilities, CPCS is constructing a plan which would impact the entire caseload. Based on consultations with the Legislature, we believe that this is the intent of the legislative initiative to change the present delivery system.

2. The Implementation Plan

The implementation plan assumes that we will hire 340 FTEs, including 201 attorneys to move toward the target caseload. The hiring of 213 new staff will take place on or before October 3, 2011 and the majority of the remainder in the second phase of hiring being on payroll on or about January 1, 2012. The staggered hiring dates are necessary in order to provide CPCS sufficient time to train and house attorneys and additional staff in new offices. The hiring will result in a dramatic increase in staffing; specifically, the payroll growth for FY 2012 will be a 73% increase over the July 2, 2011 CPCS payroll.

The mandate to transition to a delivery system whereby the caseload would significantly increase the workload of staff counsel from 10% to 25% by the “end of fiscal year 2012” means an increase of 150% in caseload. This growth needs to be realized all the while maintaining quality representation within our present case workload. Our scope of service is diverse and provides for the needs of many of the Commonwealth’s most vulnerable litigants. A constitutional crisis will occur if these services are not provided in a timely and effective manner on a daily basis. The implementation of an increase of this magnitude is a massive undertaking which has required hundreds of additional management staff hours to accomplish.

To date CPCS has hired approximately 100 attorneys and support staff. We have conducted approximately 350 interviews around the state to hire these additional staff. Managed by the Deputy Chief Counsel of the Public Defender Division and the Deputy Chief Counsel of the Children and Family Law Division during the last sixty days, this hiring rate is a huge increase over past years when an incoming class could range from 12 to a high of 31 incoming staff per year in the two major disciplines of criminal law and children and family law cases. In the past we have utilized volunteers from CPCS legal personnel staff to help in this endeavor and are continuing to do so. As the caseloads of the full time staff increase this assistance may no longer be available for the human resource needs of CPCS.

CPCS presently maintains 22 separate office locations. During a normal yearly cycle CPCS negotiates or renegotiates one or two leases. To locate and provision the staff expansion in office space, we needed to first secure a “Certificate of Emergency” from the Division of Capital Asset Management (DCAM). This classification provided that DCAM could streamline the bidding process and restrictions normally compulsory when a state agency of the Commonwealth of Massachusetts leases space. Normally this classification is provided by designating one geographical location because of some natural disaster such as fire or flood. The CPCS application for “emergency status” needed to include 19 separate locations: Boston

(Downtown), Barnstable, Hyannis, Waltham, Brockton, Fall River, Framingham, Lowell, Malden, New Bedford, Northampton, Greenfield, Pittsfield, Quincy, Roxbury, Salem, Springfield, Worcester and Waltham . The remaining three location leases are also being renegotiated through preexisting lease clauses allowing for expansion at present locations. Extensive statewide travel for site visits has been necessitated because of CPCS's limited facilities staff of one. Recognizing that it is imperative that when our first class of trainees completes training on September 28 that they have an office to work in to begin handling cases, CPCS has also taken further steps. In the event that temporary or permanent space is not available for all staff, we have developed a contingency plan to locate staff in conference rooms or any other usable space in current offices, including doubling up, if necessary.

Constitutionally entitled legal services for the indigent must also be provided by trained competent counsel or the Commonwealth risks claims of ineffective assistance of counsel and overturned court decisions. Massachusetts has been lauded as one of the best statewide defense programs in the country. This is largely due to the excellent training programs which have been developed over the last decade for both the private and public counsel attorneys. Based on adult learning principles of small scale litigation training exercises to best simulate an actual court room experience, coupled with excellent lecture content, the training program has proven to be the most effective preparation model for new attorneys. The need for this intense preparation has been further emphasized because of the specific changes in the practice affecting the length and complexity of legal work in Massachusetts. An example of this trend is seen in *Poe v. Sex Offender Registry Bd.*, 456 Mass. 801 (2010), wherein the Court held that the statutory right to counsel at Sex Offender Registry Board hearings includes the right to the effective assistance of counsel, meaning that counsel must be trained and prepared to conduct such hearings properly, or the offender will be entitled to another hearing. Several other issues have intensified the need for enhanced training so that new lawyers are sufficiently prepared on "day one" of their professional careers. These include housing and immigration collateral consequences of convictions, and the impact of technology and forensic evidence. The challenge was great when the classes were small. The mandate to increase the staff so quickly has forced the limited training staff to design and execute a professional legal training program approximately five times the normal size. Once again, the staff volunteers utilized for assisting in these exercises may not be available to the training staff in the future as overall caseloads rise for all public counsel attorneys. During the month of September, 85 new criminal and CAFL attorneys are being trained to commence accepting cases in October, 2011.

In order to determine the staffing levels needed to reach the announced goals, caseload statistics were analyzed for the last three fiscal years by county in the various case types. Based on this information staffing levels were determined and the county bar advocate programs were advised of the need to adjust criminal case duty day schedules for the future. For non-criminal cases CPCS will be working with

the court to ensure that the distribution of cases between staff and private attorneys reflects the increase in the number of CAFL staff attorneys.

3. Data Requested

The Legislature, in Chapter 68 of the Acts of 2011, has requested the following information in regard to FY2012:

- (a) The expected surplus or deficiency for Fiscal Year 2012 of items 0321-1500 and 0321-1510;
- (b) The current and projected number of public defenders and private bar advocates assigned to each court house; and
- (c) Any perceived impediments to implementing this plan by the end of fiscal year 2012 and possible solutions to such impediments;

We submit the following responses to the legislature's three specific inquiries:

- (a) “the expected surplus or deficiency for fiscal year 2012 of items 0321-1500 and 0321-1510”

The appropriation in the 0321-1500 account that funds staffing and administration is not adequate to support the expansion as described in this plan. However, the increase in the 0321-1518 appropriation (funded by fees collected by the courts) has been increased from \$750,000 to \$8.9 million thereby affording CPCS sufficient funds to support the public counsel expansion not supportable by the 0321-1500 appropriation. The entire \$8.9 million is more than is required to support the public counsel expansion so we have projected that a balance of approximately \$4.7 million will be available to cover a small portion of a projected major deficiency in the 0321-1510 private attorney compensation account.

The 0321-1510 account is funded at \$93.255 million. In FY 2010 private attorney billings totaled over \$155.6 million and are expected to exceed \$150 million for FY 2011 bills when all bills are fully accounted for in the final August billing total. Although increased public defender caseloads will reduce private counsel billing in FY 2012, we do not expect that the appropriated 38% decline from FY 2011 spending is a reasonable assumption for budgeting purposes. The 38% reduction is what is required in order for the current appropriation of \$93 million to be adequate. Based on an appropriation assumption of a 15% decrease in spending because of the increase in the public defender caseload alone, the reduction will be very difficult to reach unless a dramatic decrease in cases occurs because of improvements in indigency determination and verification. We expect that the mandate of the Legislature for the Department of Probation to improve indigency verification will lead to case reductions, but expect it will take some time for the improvements to impact caseloads.

Based on data analysis methods used in the past several years, we know that July and August are not representative of monthly billing totals for the remainder of the

fiscal year. Typically, one month of billing accounts for about 7.6% of the annual total. In July, however, the percentage of the total annual billing is only 3.5% and for August approximately 6.0%. Therefore, projecting entire year expenses early in the fiscal year does not yield results that are as accurate as those available when four to five months of data are available. Based on the data we have available, an assumed decline in private billing due to an increase in public staff and an assumed decline in cases because of improvements in indigency determination and verification, we estimate that the 0321-1510 account will be deficient by approximately \$34.3 million. We will be closely monitoring and analyzing this account throughout the year to further refine our estimate and in order to determine when supplemental funding is likely to be needed.

(b) The current and projected number of public defenders and private bar advocates assigned to each court house;

COMMITTEE FOR PUBLIC COUNSEL SERVICES

Private Attorneys Available for Assignment, FY 2012

By County and Court/Case Type*

<u>County</u>	<u>District Court</u>	<u>Juvenile Court</u>	<u>CAFL Cases</u>	<u>Superior Court</u>	<u>Mental Health Cases</u>	<u>Appeals Courts</u>	<u>Murder Cases</u>	<u>Attorney Count</u>
Barnstable	365	311	131	109	334	217	26	112
Berkshire	248	213	113	96	217	209	23	70
Bristol	657	562	220	214	585	458	66	230
Dukes	57	52	20	16	55	22	1	7
Essex	685	557	261	206	656	479	55	359
Franklin	177	160	62	70	167	136	21	54
Hampden	639	533	212	218	541	429	59	246
Hampshire	273	238	126	88	83	201	19	101
Middlesex	973	810	407	319	921	640	93	561
Nantucket	45	41	25	17	42	16	4	1
Norfolk	669	555	272	213	626	425	61	379
Plymouth	711	582	227	249	640	503	80	187
Suffolk	1,157	960	395	386	1,053	700	117	445
Worcester	694	577	202	228	440	439	67	273
TOTAL PRIVATE ATTORNEYS								3,025

* All figures except "Attorney Count" include counting most private attorneys more than once for County and Court/Case type representation because they practice in more than one county and are certified to take more than one type of case. The "Attorney Count" has no duplicate counts.

**Public Defenders Available for Assignment, FY 2012
By County and Court/Case Type***

	<u>District Court</u>	<u>Juvenile Court</u>	<u>CAFL Cases</u>	<u>Superior Court</u>	<u>Mental Health Cases</u>	<u>Appeals Courts</u>	<u>Murder Cases</u>	<u>Attorney Count**</u>
Barnstable	6	0	3	4	0	0	1	12
Berkshire	3	0	4	4	0	0	1	13
Bristol	16	4	5	8	2	0	2	34
Dukes	0	0	0	0	0	0	0	0
Essex	8	4	6	12	0	0	5	30
Franklin	0	0	0	0	0	0	1	0
Hampden	17	4	10	10	4	0	3	40
Hampshire	6	0	3	5	0	0	1	12
Middlesex	24	8	5	18	1	1	5	58
Nantucket	0	0	0	0	0	0	0	0
Norfolk	11	4	0	7	0	0	2	22
Plymouth	11	0	7	8	7	0	3	32
Suffolk	30	4	9	20	4	8	5	71
Worcester	14	5	8	9	1	0	2	36
TOTAL PUBLIC DEFENDERS								360

* All figures except "Attorney Count" include counting some attorneys more than once because they are certified to take more than one type of case. The "Attorney Count" has no duplicate counts.

** Attorney Count for Public Defenders includes 85 inexperienced new hires who started training on 8/30/11 and will be building their caseloads as quickly as possible based on demonstrated ability to provide effective representation.

(c) Any perceived impediments to implementing this plan by the end of FY 2012 and possible solutions to such impediments;

There are several very real impediments to reaching the goal of implementing a system in which no less than 25 percent of indigent defendants shall be represented by public defenders by the end of fiscal 2012. These impediments present themselves in every area of the administration of a delivery system which provides services in hundreds of thousands of cases in a number of different practice areas with a very broad scope of service in every court of the Commonwealth. The following issues have been identified as challenges which CPCS will strive to overcome to reach the legislative goal.

- i. There are established practices and protocols utilized throughout the Commonwealth's courts in every county developed over the last twenty-five

years to assign cases to the private bar. The courts depend on the availability of counsel to ensure that the administration of cases goes forward in a timely manner. For scheduling purposes, duty days are assigned months in advance so that practitioners, both public and private, can make sure that they are available and are not otherwise tied up with a trial and/or other responsibilities in their practice. The reassignment of duty days is a huge administrative problem involving thousands of practitioners' schedules for not only the bar advocate programs, but also the new or existing staff. In order to manage the transition to a new system CPCS has spent many hours meeting and teleconferencing with every County Bar Advocate program and public counsel county office head.

- ii. CPCS is further impeded by the challenge of acquiring space, and setting up IT infrastructure and telecommunications systems for the new hires in a timely manner. In order for these new attorneys to be able to be ready to take on cases immediately, they must have an appropriate place to practice law and have access to computer equipment, library resources and conference space to meet with clients. Desks must be ordered, computers must be installed, and staff will need to be oriented to new locations. There will also be disruption of the present staff during this period as offices are reconfigured and moved to accommodate new staff. In order to address this substantial relocation effort, CPCS has taken the following steps to attempt to minimize the upheaval of the attorneys as they commence and continue to be responsible for their daily caseloads:
 - In order to enable our implementation plan to be realized we requested that the Division of Capital Asset Management (DCAM) declare that the present extraordinary needs of the CPCS be considered under M.G.L. Chapter 7, Section 40H and that pursuant to paragraph 2 of said section that the Commissioner certify in writing that an emergency exists allowing the advertising requirements of the law be shortened or waived. This emergency certification was approved and is now effective for 19 locations. Although this has shortened the bidding period we are still in the negotiation stage with most of the landlords statewide. Concerned as to the status of these negotiations we have developed a three level plan to: 1.) acquire temporary space, 2.) acquire permanent space, 3.) use all existing space possible, including conference rooms, meeting rooms, shared offices or any other suitable space in current offices, to place new staff in on October 3, 2011.
 - We have also redesigned FY 2011 information technology infrastructure to eliminate file servers in each office location and replace them with central bands of servers in Boston and Brockton to serve the entire state. Two locations were chosen to ensure proper backup and live redundancy for disaster recovery and emergency situation operation.
 - The FY 2011 telecommunications infrastructure was also redesigned to eliminate, wherever possible, telephone systems in each individual office

location. Where appropriate, affordable, high-speed data lines will be made available to transition to Voice Over Internet Protocol (VoIP) technology to eliminate the need for individual systems. This solution provides significantly less set up time, a lower cost and lower labor intensive maintenance of systems because the third party vendor provides the software and services through cloud computing arrangements.

- iii. CPCS is not able to secure enough attorney applicants to be hired within the constraints of the salary levels offered. Most law school students graduate with considerable debt which can sometimes mean thousands of dollars monthly in student loan payment obligations. The major courts wherein the bulk of the cases emanate from are also located in urban centers which traditionally have a higher cost of living. CPCS work is also not the practice of the meek. The cases are difficult and challenging. Although many private practitioners take CPCS cases, only a small percentage of those attorneys choose to commit most of their practice to this line of work. In order to enhance our ability to secure appropriate applicants, we have undertaken an intensified outreach to the legal community and law schools nationwide. This effort is being orchestrated by a newly created position of Legal Hiring Coordinator.
- iv. The impediment to hiring enough lawyers quickly is also present for securing non-legal staff. The hiring of administrative assistants, social workers and investigators is essential to the productivity of the legal staff. We have consistently had difficulty filling positions, despite the economy, because of our pay structure and our difficult case matter responsibilities. The Human Resource department has instituted a broader circulation of our employment postings and will be coordinating the hiring of these additional positions with an additional newly hired staff person.
- v. Another impediment is the steep learning curve of newly hired legal staff resulting in lower productivity. New attorneys must gain the experience needed to effectively handle higher caseloads. They must be properly trained and supervised to “effectively” represent clients. CPCS is planning to implement an enhanced supervisory attorney role to assist these new lawyers, if possible, within the budget appropriation.
- vi. The budget contemplates the hiring of present bar advocates for positions in the newly expanded staff counsel offices. Although certainly a long time benefit to the provision of legal services to the indigent because of their experience level, their employment is not a quick fix to CPCS’s staffing needs. An identifiable impediment to these practitioners assisting in reaching the numerical target is that most would not be available immediately because it will take time to close their practices before they are able to take cases. Many would need to spend months wrapping up their ethical and financial responsibilities to their clients and colleagues. In order to facilitate the assimilation of these attorneys, CPCS will work with them to allow a transition within the Commonwealth of Massachusetts

Comptroller's rules and the Massachusetts Board of Bar Overseers Rules of Professional Responsibility regarding conflicts.

- vii. Although not an impediment to reaching the goal of 25% staff counsel representation, the lack of proper indigency verification of individuals before the court who have the potential to be deemed eligible for appointed counsel is a major impediment to the cost containment needs of the Committee for Public Counsel Services. Since 1991, CPCS has been working with the Legislature and the Executive branch in an attempt to strengthen and improve upon the system used by Probation and the Courts to determine indigency. In 2005, the Rogers Commission Report recommended changes be implemented, changes which the Legislature included in Chapter 54 of the Acts of 2005. The changes were never fully implemented. Again this year in Chapter 68 of the Acts of 2011, the General Appropriation law provisions were included to implement strict protocols to ensure eligibility. CPCS stands ready to work cooperatively with the Probation Department to assist in the implementation of this change.

CPCS is working diligently to meet the directive of Chapter 68 of the Acts of 2011. It is an undertaking of significant magnitude, which will present challenges that will impact the delivery of legal services to the indigent of the Commonwealth for years to come. However, CPCS is committed to facing these challenges, achieving the goal established by Chapter 68 and maintaining the superior quality of zealous representation to which our clients are entitled.

Respectfully submitted



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